

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 15, 2007

ISAAC OBA KING v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2005-C-1688 J. Randall Wyatt, Judge

No. M2006-02745-CCA-R3-CD - Filed September 4, 2007

The post-conviction petitioner, Isaac Oba King, appeals the Davidson County Criminal Court's summary dismissal of his petition. That court ruled that the petitioner's claims of an unknowing guilty plea and of ineffective assistance of trial counsel were based upon allegations that trial counsel "failed" to inform the petitioner of the effect of a conviction upon his immigration status. The court held that counsel's failure to inform the petitioner about the potential of his deportation did not state a legal claim for post-conviction relief. Because we determine that the petition also alleged that counsel "erroneously" advised the petitioner about deportation, we reverse the post-conviction court, vacate the order of dismissal, and remand for an evidentiary hearing.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Reversed, Vacated, and Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

David Hopkins, Nashville, Tennessee, for the Appellant, Isaac Oba King.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kyle Anderson, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The petitioner pleaded guilty to a Class C felony of selling cocaine and received a six-year, suspended sentence. The trial court entered the judgment on October 5, 2005. On January 18, 2006, the petitioner filed a "motion to vacate conviction and sentence," in which he alleged that the State's undercover police officer misrepresented facts and entrapped the petitioner and that his trial counsel was ineffective in failing to raise the issue of entrapment and in misinforming the petitioner "of the direct consequences of the underlying [f]ederal deportation proceedings." The State moved to deny the petitioner's motion, asserting it to be an untimely motion to withdraw a guilty plea. The trial court appointed counsel to represent the petitioner.

On April 6, 2006, the petitioner, through counsel, filed a “petition for post-conviction relief,” which was apparently intended as an amendment to the motion originally filed. This later-filed petition alleged that, following his guilty plea and placement on probation, he was arrested by federal immigration officers, and based upon the petitioner’s October 5, 2005 judgment of conviction, federal authorities initiated deportation proceedings and incarcerated him in Louisiana. The petition alleged that the petitioner’s guilty plea was unknowing and involuntary and was the result of the ineffective assistance of trial counsel because counsel had failed to advise the petitioner that the conviction could subject him to deportation. The State then moved to dismiss the petition for post-conviction relief, asserting that the guilty plea was knowing and voluntary and that the petitioner was deprived of no constitutional rights. The State relied upon *Bautista v. State*, 160 S.W.3d 917 (Tenn. Crim. App. 2004), wherein this court held that Bautista’s counsel was not ineffective in “failing” to inform him “of potential consequences of deportation.” *See id.* at 922. The petitioner subsequently filed an affidavit in which he stated that he was imprisoned in Louisiana on the federal immigration charge and that trial counsel had “misinformed” him about the potential for deportation.

On August 14, 2006, the post-conviction court entered an order dismissing the post-conviction petition. The court recited that the petition for post-conviction relief averred that trial counsel had essentially failed to advise the petitioner about deportation and did not claim that counsel had misinformed or erroneously informed the petitioner. The court held that the affidavit asserted “facts not included in [the] Petition [and that] the Affidavit should not be considered as a supplement to [the] Petition.” The court further held that the petitioner’s claims of an unknowing guilty plea and ineffective assistance of counsel were controlled by *Bautista*.

The petitioner filed a timely notice of appeal.

On appeal, the State concedes in its brief that the “post-conviction court erred by refusing to consider the allegation in the . . . affidavit that his trial counsel . . . erroneously inform[ed] him that this guilty plea would not have any impact on his immigration status.” The State based its concession in part upon Tennessee Code Annotated section 40-30-110(a), which provides that, when a post-conviction petitioner is incarcerated out of state, the post-conviction court “may permit the introduction of an affidavit or deposition of the petitioner.” *See* T.C.A. § 40-30-110(a) (2006). The State acknowledged in its brief that the petitioner’s original motion to vacate the conviction alleged that counsel “misinformed” and “erroneously” advised him about the possibility of deportation. Accordingly, the State urges this court to remand the case to the post-conviction court for an evidentiary hearing.

We agree with the petitioner and the State, but we take pains to clarify that the content of the petitioner’s affidavit is not the basis for the remand.

“Failure to state a factual basis for the grounds alleged [in a post-conviction petition] shall result in immediate dismissal of the petition.” T.C.A. § 40-30-106(d) (2006). Also, “[i]f, on reviewing the petition, the response, files, and records, the court determines conclusively that the

petitioner is entitled to no relief, the court shall dismiss the petition.” *Id.* § 40-30-109(a). Additionally, “[p]roof upon the petitioner’s claim or claims for relief shall be limited to evidence of the allegations of fact in the petition.” *Id.* § 40-30-110(c).

In light of these clear statutory requirements, we decline in the present case to base a remand upon the petition being supplemented or amended by the terms of the later-filed affidavit. Code section 40-30-110(a) indeed authorizes a post-conviction court to permit the filing of an affidavit or deposition by an out-of-state prisoner, but the provision is intended as a means for such petitioner to submit evidence, in lieu of live testimony, *in the evidentiary hearing*. The section does not speak to using an affidavit *to amend a petition*, the substance of which must be evaluated by the post-conviction court prior to ever awarding an evidentiary hearing. *See id.* § 40-30-109(a).

In the present case, however, the State concedes that the petitioner’s original filing alleged that counsel erroneously advised him about the effect of a conviction upon his immigration status.¹ Despite the filing of an amendment styled as a “post-conviction petition,” we believe that this latter filing supplemented rather than restated the “petition.” This court has previously addressed a similar issue. In *Michael O. Brown v. State*, No. M2001-00917-CCA-MR3-CD (Tenn. Crim. App., Nashville, Aug. 8, 2002), we stated the following:

On appeal, the petitioner takes the view that the amended petition was an amendment to the pro se petition, essentially equivalent to a supplement. We believe that this view of an amended petition has support in our law. When a pro se post-conviction petition is filed and counsel is appointed or retained, counsel “shall be required to review the pro se petition, file an amended petition asserting *other* claims which petitioner arguably has or a written notice that no amended petition will be filed.” Tenn. R. Sup. Ct. 28, § 6(C)(2) (emphasis added). After the state responds to the petition, the post-conviction court is directed to conduct a colorable claim review by reviewing both the petition and the amended petition. *Id.* § 6(B)(6). At the hearing, the post-conviction court must freely allow amendments to the petition “when the presentation of the merits of the cause will otherwise be subserved.” *Id.* § 8(D)(5). Our Code provides that amendments to the petition “shall conform substantially to the form for original petitions, except that *matters alleged in the original petition need not be repeated*.” Tenn. Code Ann. § 40-30-204(g) (1997) (emphasis added). Thus, the scheme of the post-conviction law is to have counsel amend the petition “so that when the petition is heard all grounds on which the petitioner may rely will be before the court.” *State v. Smith*, 814 S.W.2d 45, 47 (Tenn. 1991); *see also David Honey v. State*, No. 03C01-9512-

¹ At the time of submitting his plea, the petitioner was apparently a legal immigrant.

CC-00400, slip op. at 3-5 (Tenn. Crim. App., Knoxville, Mar. 18, 1997) (construing provisions of prior post-conviction relief law). The Post Conviction Procedure Act contemplates the filing of only one petition; thus, all potential claims a petitioner has must be determined at the time of adjudication of the petition if they are to be ventilated in the post-conviction arena. *See* Tenn. Code Ann. § 40-30-202(c) (1997) (filing of a single petition is contemplated, and subsequent post-conviction petitions shall be summarily dismissed). Thus, appointed counsel may well file additional allegations without changing the original allegations. Furthermore, counsel must be circumspect in limiting the claims that are presented to the post-conviction court. Although counsel may suggest that some asserted grounds are meritless and might urge that those grounds be limited or modified, counsel in a post-conviction case has a duty to assert those claims that the petitioner “arguably has” and counsel must “diligently investigate and present all reasonable claims.” Tenn. R. Sup. Ct. 28 § 6(C)(2).

Michael O. Brown, slip op. at 7. The *Michael O. Brown* court said that the “petitioner essentially supplemented rather than restated, the petition.” *Id.* Following this approach, the counsel-assisted petition for post-conviction relief not only effectively converted the original motion proceeding to a post-conviction proceeding but also supplemented the original pro se filing. As such, the post-conviction petition pending before the court contained an allegation that counsel had erroneously informed the petitioner about the effect of a conviction on his immigration status.

Because *Bautista* was predicated upon a claim that trial counsel had failed to inform the guilty-pleading defendant of his conviction’s collateral consequence of deportation, *Bautista* does not dispose of the petitioner’s claim that his counsel erroneously advised him about the effect of his conviction upon his immigration status.

Accordingly, we reverse the ruling of the post-conviction court, vacate the order of dismissal, and remand the case for an evidentiary hearing.

JAMES CURWOOD WITT, JR., JUDGE